CEMPAKA FINANCE BERHAD

v.

MENANG - S.K. BROTHERS ENTERPRISE SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J
[CIVIL CASE NO. D5-22-1685-92]
21 MARCH 1995

BANKING LAW: *Finance company entering into block discounting agreement - Agreement amounting to the purchase of debts - Validity of transaction under ss. 4 & 20 of the Finance Companies Act 1969 - Effect of ss. 127(2)(b), 128(9) Banking and Financial Institutions Act 1989.*

PRACTICE & PROCEDURE: *Order 14 RHC 1980 - Summary judgment - Block discounting agreement - Whether plaintiff, a finance company, able to provide facilities under agreement - Whether contrary to s. 20 of the Finance Companies Act 1969 - Whether any triable issues.*

WORDS & PHRASES: *"Borrowing business" - Section 4 Finance Companies Act 1969.*

WORDS & PHRASES: "*Provision of finance" - Section 127 (2)(b) Banking and Financial Institution Act 1989.*

The plaintiff bought hire purchase agreements from the first defendant at their request between 21 September 1990 and 20 June 1991, based on a block discounting agreement which, *inter alia*, provided for indemnity by the first defendant. The second defendant had also entered into a guarantee agreement with the plaintiff and was liable as a principal debtor. The first defendant failed to pay the monies due to the plaintiff and the plaintiff applied for summary judgment for the sum due. It was submitted by the Counsel for the first defendant that the plaintiff had contravened ss. 2 and 127 of the Banking and Financial Institution Act 1989 and ss. 4 and 20 of the Finance Companies Act 1969 and that the plaintiff as a finance company could not provide the block discounting facilities.

Held:

[1] Pursuant to s. 4 of the Finance Companies Act 1969 (FCA) "borrowing business" includes the lending or the investment by the borrower of the borrower's fund and it does not cover the purchase of debts. When the relevant agreement was entered into, it was void under the FCA. However, the position changed with the coming of the Banking and Financial Institution Act 1989 (BAFIA) whereby s. 128(9) of the BAFIA repeals the FCA but transactions under the FCA continue to be recognised as being valid. Section 127(2) of the BAFIA was accordingly amended to add "provision of finance" which covers the business of acquiring debts to any person. As such, although the relevant block discounting agreement was not valid when signed, the amendments to the BAFIA were retrospective and accordingly it is currently valid.

[2] Under s. 20 of the FCA, no finance company may give unsecured advances, loans or credit facilities in excess of RM5,000 except to a registered finance company. It is clear that the transaction exceeded RM5,000 and that the first defendant is not a registered finance company. It is also clear that the security was the guarantee agreement entered into by the second defendant which falls on all fours with the definition in s. 20(2)(b) of the FCA. Since the transaction appears not to have complied with s. 20 of the FCA, this raises a triable issue.

[Application dismissed with costs].

Cases referred to:

Mayban Finance Berhad v. Aik Soon Auto Sdn. Bhd. (formerly known as Aik Soon Auto Finance Sdn. Bhd.) & 4 Ors. [1993] 2 AMR 33 1957 ***(foll)***

Sabah Finance Berhad v. Menang-SK Brothers Enterprises Sdn. Bhd. & Anor. [1995] 1 AMR 33 ***(cit)***

Arab-Malaysian Merchant Bank Berhad v. Boustead Trading (1985) Sdn. Bhd. [1994] 1 AMR 9 473 ***(refd)***

Wee Wood Industries Sdn. Bhd. v. Guannex Leasing Sdn. Bhd. [1990] 2 CLJ 1060 ***(refd)***

Bhai Panna Singh and Others v. Bhai Arjun Singh and Others [1929] AIR 179 ***(refd)***

Khalid Panjang & Ors. v. Public Prosecutor (No.2) [1964] 30 MLJ 108 ***(refd)***

Co-Operative Central Bank Ltd. (In receivership) v. Meng Kuang Properties Bhd. [1991] 2 CLJ 1144 ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad [1989] 3 MLJ 155 ***(refd)***

Ngai Heng Book Binder Pte. Ltd. v. Syntax Computer Pte. Ltd. [1988] 2 MLJ 205 ***(refd)***

YK Fung Securities Sdn. Bhd. v. Ronald Yeoh Kheng Hian [1989] 3 MLJ 490 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989 ss. 2, 127(2)(b), 128(9)
Finance Companies Act 1969 ss. 2, 4, 20, (2)(b)

For the plaintiff - Preeti Kaur; M/s. Riza Leong & Partners
For the first defendant - N. Paneer Selvam; M/s. Shan Selvam & Associates
For the second defendant - Teh Meng Teck; M/s. Cheah Teh & Su

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:

The plaintiff had applied for summary judgment against both the defendants for RM621,941.54 with interest at eighteen per cent per annum from 22 November 1992 up to the date of full settlement and costs by way of summons in chambers filed on 3 March 1993 but the amount had been amended to RM627,742.63 by way of affidavit filed on 1 July 1994.

Learned Counsel for the plaintiff had referred to the block discounting agreement dated 12 April 1990 where in particular section 4 had provided for the indemnity by the dealer namely the first defendant and section 6 had stated the eighteen per cent interest. Based on the said agreement and at the request of the first defendant, the plaintiff had bought the hire purchase agreements from the first defendant between 21 September 1990 and 20 June 1991. The second defendant had also entered into the relevant guarantee agreement with the plaintiff on 12 April 1990 and was also liable as a principal debtor.

The first defendant had subsequently failed to pay the monies due and on 30 June 1990 the amount outstanding was RM673,105.94. Notice of demand had been sent by registered post to the first defendant on 10 July 1992 and to the second defendant on 12 November 1992. Two payments of RM28,417 were made by the first defendant to the plaintiff on 19 August 1992.

According to learned Counsel for the first defendant, the plaintiff had contravened ss. 2 and 127 of the Banking and Financial Institutions Act 1989 (hereinafter "the BAFIA") and ss. 4 and 20 of the Finance Companies Act 1969 (hereinafter "the FCA"). Consequently, learned Counsel had submitted that the plaintiff as a finance company could not provide the block discounting facilities.

Learned Counsel for the second defendant had told the Court that he did not dispute section 5 of the block discounting agreement as regards the damages for delayed payment and the eighteen per cent interest but he argued that the plaintiff must first prove damages despite

the provision of the penalty rate of interest which he felt was excessive. He added that the notice of demand against the second defendant was bad as although there were two payments made on 19 August 1992, no deduction had been made from the amount due.

Now, what is the effect of the block discounting agreement? According to section 1.01 therein, the plaintiff will at the request of the first defendant from time to time consider and if thought fit purchase from the first defendant the contractual rights of the first defendant in the hire purchase agreements entered into by the first defendant as owner with the respective hirers on the property in the goods comprised in the hire purchase agreements. In other words, it is the purchase by the plaintiff of the debts owed to the first defendant.

Is this form of transaction valid under the FCA? It is not disputed that the plaintiff is a finance company and pursuant to s. 4 of the FCA "borrowing business" as defined in s. 2 of the FCA includes the lending or the investment by the borrower of the borrower's funds. It does not cover the purchase of debts and therefore when the relevant agreement was entered into, it was void under the FCA. However, the position changed with the coming of the BAFIA. Section 128(9) of the BAFIA repeals the FCA but transactions under the FCA continue to be recognised as being valid. Section 127(2) of the BAFIA was accordingly amended to add "provision of finance" which covers the business of acquiring debts to any person. As such, although the relevant block discounting agreement was not valid when signed on 12 April 1990, the amendments to the BAFIA were retrospective and accordingly it is currently valid and no issue arises now for consideration.

Judicial sanction on this point had been given in *Mayban Finance Berhad v. Aik Soon Auto Sdn. Bhd. (formerly known as Aik Soon Auto Finance Sdn. Bhd.) & 4 Ors.* [1993] 2 AMR 33 1957 which had ruled that although an agreement to acquire the debts of another is void and unenforceable as it falls outside the FCA, this has been retrospectively remedied by s. 127 of BAFIA whereby "finance business" had been extended to include "the provision of finance" which pursuant to s. 127(2)(b) of BAFIA includes the business of acquiring the debts due to any person.

It is pertinent to reproduce the relevant passages of the said judgment which reads:

> Under the Finance Companies Act 1969, a finance company like the plaintiff can only carry on the business of finance, which under s. 2 of the Act has been defined to include the lending or investing of finance. To that end, the business of acquiring the debts of another, which is the very nature of the master agreement, falls well outside the ambit of the Act and for that very reason, the master agreement is void and unenforceable. However, this position of the law has been regularised by s. 127(1) of the Banking and Financial Institutions Act, 1989 (BAFIA), by amending s. 2 of the 1969 Act and extending the meaning of the words "finance business" to include "the provision of finance" which in turn has been defined by sub-section (2)(b) of s. 127 of BAFIA to include the business of acquiring debts due to any person. Under sub-section (4) of the same section of BAFIA, these amendments are deemed always to have been an integral part of the 1969 Act as from the date of commencement of the 1969 Act until immediately before the date of commencement of the repeal of the 1969 Act under s. 128(1) of BAFIA.
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> The 1969 Act came into force on 1 June 1969, and by virtue of the amendments extending the scope of a finance company to enter into the business of acquiring the debts due to any person as at that date, it is clear that by the retrospective effect of the amendments, which would not be enforceable under the 1969 Act, are now made enforceable by the amendments under BAFIA. This is so, as after making such amendments to take effect retrospectively, BAFIA repealed the whole of the 1969 Act.

Hence, a block discounting agreement is therefore now legally binding - see also *Sabah Finance Berhad v. Menang-SK Brothers Enterprises Sdn. Bhd. & Anor*. [1995] 1 AMR 33.

Under s. 20 of the FCA, however, no finance company may give unsecured advances, loans or credit facilities in excess of RM5,000 except to a registered finance company, bank or any other financial institution approved by Bank Negara Malaysia. It is also clear that the transaction in our case exceeded RM5,000 and that the first defendant is not a registered finance company, bank or financial institution approved by Bank Negara Malaysia. Is the transaction in relation to unsecured advances, loans or credit facilities? Learned Counsel for the plaintiff had not submitted on this point but it is amply clear that the security was the guarantee agreement entered into by the second defendant which falls on all fours with the definition in s. 20(2)(b) of the FCA. Since the transaction appears not to have complied with s. 20 of the FCA, it was my view that this raises a triable issue.

It is odd that the second defendant had spoken against this penalty interest of eighteen per cent when it is so well stated in section 5.01 of the agreement. Learned Counsel for the second defendant had relied on *Wee Wood Industries Sdn. Bhd. v. Guannex Leasing Sdn. Bhd.* [1990] 2 CLJ 1060. It had been decided there that the damages suffered had to be proved for the penalty interest or liquidated damages to apply but it must be observed that this issue should have been raised by the first defendant as signatory to the relevant agreement and not by the second defendant. Be that as it may, in view of the provisions having been clearly stated in the relevant agreement, it was my considered opinion that this was not an issue for trial.

As regards the discrepancies in the accounts stated in the notice of demand sent to the second defendant as the part payment and the rebate had not been deducted, the plaintiff had admitted the error in their subsequent affidavit in reply and they had accordingly amended their statement of claim with no objections from the second defendant.

As there is a triable issue raised as regards the non-compliance with s. 20 of the FCA, I had no other alternative but to dismiss the plaintiff's application for summary judgment against the first defendant with costs. Although the second defendant had not been able to raise any triable issue, the validity of the guarantee rests upon the validity of the main agreement. In consequence, the plaintiff's application for summary judgment against the second defendant must also be dismissed with costs.